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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>KENNETH LEE WILKINSON,<br>Defendant and Appellant. | A143605<br><br>(Mendocino County Super. Ct. No. SCUKCRCR122096602) |

In 1998 the nation was horrified at the fate of James Byrd, Jr., who was dragged behind a pickup until his body disintegrated. That is what defendant Kenneth Lee Wilkinson did to his 84-year-old grandfather who was suffering from Alzheimer's. Defendant purports to appeal from the order denying his motion to withdraw his eve-of-trial plea of guilty to the charge of first degree murder, contending the denial was an abuse of the trial court's discretion under Penal Code section 1018 (section 1018) on two bases: (1) he established that his trial counsel was constitutionally incompetent, and (2) there was not an adequate factual basis for his plea.[1] We conclude both claims are without merit, and affirm.

[1] Statutory references are to the Penal Code.

Defendant's notice of appeal identifies the order denying his motion as the object of his appeal, not the judgment entered when he was sentenced several weeks later. Defendant's notice—which he prepared—is accompanied by the certificate of probable cause which is also necessary to perfect a valid appeal from a judgment or order based on a guilty plea. (§ 1237.5, subd. (b); Cal. Rules of Court, rule 8.304(b)(2).) However, "[a]n order before judgment denying a motion to withdraw a guilty plea is not appealable,

## BACKGROUND

Defendant's motion was the subject of a two-day evidentiary hearing, at the conclusion of which Judge John A. Behnke wrote a very detailed order declining to let defendant withdraw his plea. It deserves quotation at length (with purely minor editorial, non-substantive changes we have added):

"In October of 2012 the defendant filed a pro per declaration requesting a change of venue to Sonoma County and complaining about the representation by attorney Purviance. The court construed Mr. Wilkinson's declaration, at least in part, as a *Marsden* motion and held a hearing on November 8, 2012. Attorney Purviance represented that he and the Public Defender Linda Thompson would be teaming up on the case and that Ms. Thompson would probably take the lead on it. The *Marsden* motion was denied without prejudice to renewing it at a later time. Mr. Wilkinson was specifically advised that he could make the motion again if he still felt he wasn't being properly represented. Attorney Purviance developed significant health problems and by early 2013 the Public Defender, Linda Thompson, stepped in to personally take over the case. The trial was reset at her request to May of 2013. That trial date would not hold either as on March 29, 2013 defendant personally entered an additional plea of Not Guilty by Reason of Insanity or NGI. The defense decision to enter that plea was influenced by Attorney Thompson's extensive confidential consultation with Dr. Howard Terrell who had conducted a detailed examination of the defendant at the defense request. The court subsequently appointed Dr. Paul Good and Dr. Donald

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but can be reviewed on an appeal from the judgment. [Citations.] Although on such an appeal the merits of the issue of guilt or innocence are not reviewable [citation], both before and after the enactment of section 1237.5, the constitutional, jurisdictional and other errors referred to in that section have been reviewed. Particular claims of error that have been considered and that may still be considered include . . . ineffective assistance of counsel . . . or other abuse of discretion in denying a motion to withdraw a guilty plea." (*People v. Ribero* (1971) 4 Cal.3d 55, 62–63.) In keeping with the policy of liberally construing a notice of appeal in favor of its sufficiency, we will construe defendant's notice as perfecting a premature appeal from the judgment. (See Cal. Rules of Court, rules 8.100(a)(2), 8.104(d).)

Apostle to examine the defendant and report to the court pursuant to Penal Code section 1026 and 1027. The last of their reports was not received by the court until late June of 2013. The court meanwhile had set a further trial late in September of 2013.

"Shortly before the September trial date the People moved for a continuance based on the recent disclosure by the defense of Dr. Terrell's extensive psychiatric report. Attorney Thompson floated various possible dispositions both in and out of court initially seeking a determinate sentence and later offering up a second degree murder plea. The DA never wavered from insisting that the case was a first degree murder. Meanwhile, unbeknownst to the court the defendant, through correspondence with his attorney, was seeking any disposition that didn't involve a life sentence. Due to witness availability issues, after further continuances, a firm trial date of April 14, 2014 was finally arrived at. A pre-trial conference was held on March 27, 2014. In open court the defense offered a plea to second degree murder. The prosecution refused to accept that offer. Motions in limine were set for April 10. Significantly, the court heard and denied the defense motion for change of venue without prejudice to renewing the same during jury selection. Additionally, the prosecution's motion for a jury view of the route driven by Defendant Wilkinson while his grandfather was tied to the back of the truck was granted. The court also made an in limine ruling regarding expert testimony about mental states. After a discussion about witness scheduling issues the parties were ordered to return on April 14 at 9 a.m. for jury selection.

"On the morning of trial the attorneys advised the court that there would be a change of plea. Ms. Thompson stated that the defendant wanted to take advantage of the prosecution's offer to drop the special circumstance in exchange for a plea of guilty to first degree murder. Mr. Wilkinson, who was present in court when counsel stated the agreement, confirmed that he was prepared to accept that disposition and the court proceeded to take his plea. He was advised that the penalty would be 25 years to life and that if at some point in the future he was to be paroled he would remain on parole for the rest of his life. He acknowledged that he had adequate time to discuss the matter with his attorney and that no threats or promises had been made to him other than the

promise that the special circumstance would be dismissed. . . . Counsel for defendant acknowledged that, based on the police reports, there were facts sufficient to support a first degree murder conviction and possibly the special circumstance as well. Mr. Wilkinson personally acknowledged that he understood everything that had been said in that proceeding including the consequences of the plea before he entered a plea of guilty. The case was set for judgment and sentence on May 9, 2014.

**"The request to withdraw the plea**

"On May 9, 2014, when the case came on for judgment and sentence, the defendant stated he would like to withdraw his plea. The court put the matter over for two weeks to allow time for the defendant to discuss such a request with his attorney. On May 23, 2014 the defendant appeared with his attorney Ms. Thompson. Ms. Thompson reported that she was unable to make the motion to withdraw the plea because she found no legal basis for it. The court therefore appointed a skilled experienced private attorney, Jan Cole-Wilson, to represent Mr. Wilkinson with respect to his request to withdraw the plea. Ms. Cole Wilson took some time to investigate the matter before announcing on June 19, 2014 that she believed there were grounds to withdraw the plea. The court then set a briefing time table. Ms. Cole-Wilson also requested and was granted funds for an investigator to interview witnesses. The motion to withdraw the plea was ultimately filed on August 15, 2014. The People's Opposition was filed September 11, 2014 and the hearing was ultimately completed on September 26.

**"Factual Background**

"This is a tragic case with horrific facts. The 22 year old defendant with a minimal prior criminal record killed his disabled 84 year old grandfather and dragged the grandfather behind a pick-up truck for about 6 miles before disposing of what remained of the corpse down a steep hillside. There was evidence of voluntary intoxication with drugs and alcohol but no evidence of significant pre-existing mental health condition or treatment for the same. The defendant told Dr. Terrell a year after the killing that he didn't know what precipitated his homicidal attack on his

grandfather. Dr. Terrell's report indicates that the defendant claimed his grandfather had called him a 'junky drug attic' [*sic*] before defendant killed him. The defendant said at one point he thought he had killed his grandfather with an axe before he tied him to the trailer hitch of the pick-up. The pathologists for the prosecution were prepared to state that the grandfather was still alive when the dragging started and the expert pathologist the defense consulted was unable to refute that contention. The defense reasonably feared that a trier of fact might find the torture allegation true. Either a second or a first degree murder conviction would trigger a sentence with a life tail. A first degree murder with the special circumstance would result in an LWOP [life without possibility of parole] commitment. Neither court appointed psychiatrist supported an NGI plea. The stakes were quite high and the options clear. Go to trial and risk an LWOP commitment or plead to the first degree murder and accept a sentence of 25 years to life with a possibility of parole. On April 14, 2014, the defendant and his counsel chose the latter.

"The defense submitted a Sentencing Memorandum which included the toxicology report and Dr. Terrell's report. The toxicology report was positive for metabolites of marijuana and positive but below the standard cut-off levels for the DOJ [Department of Justice] lab for methamphetamine. Dr. Terrell's report gave some insight into the defendant's actions and state of mind when the homicide occurred and into how the defense would be presented at trial. It also explained why Ms. Thompson entered the NGI plea. The report date was approximately one year before the final trial date. The probation report attached copies of the reports of Dr. Good and Dr. Apostle at the defense request. The defendant cooperated in the probation interview and took 'full responsibility' for his grandfather's death.[2] He was not as forthcoming about his

[2] According to the probation officer's report: "When asked to speak of the incident, he [defendant] described it as 'a tragedy.' The defendant also said, 'I regret it.' He did not attempt to place blame on anyone else, but claimed he has no understanding of why he did it. Wilkinson stated he . . . repeatedly asks himself . . . 'how could I have done this.' He claimed he remembers very little of the evening and what he does remember is like 'in the third person,' or like an 'out-of-body experience.'

specific involvement in that death with probation as he was with Dr. Terrell. On May 9 at the sentencing hearing the defendant indicated that he wanted to withdraw his plea.

"**The Motion**

"Defendant's motion to withdraw his plea was supported by his declaration, copies of a number of letters he had written, a short declaration from Ms. Cole-Wilson and accompanying points and authorities. The thrust of the motion is that the defendant claims he pled guilty to first degree murder on the morning of trial because he felt that as a result of his attorneys failure to provide competent assistance, he and his attorney were not prepared for trial. Ms. Cole-Wilson's brief correctly points out that the Sixth Amendment right to counsel extends to the plea bargaining process. She alleges that Ms. Thompson's conduct in investigating the case, preparing for trial and communicating with the defendant fell below an objective standard of reasonableness. She further claims prejudice by alleging that but for those lapses of counsel the defendant would not have pled guilty. Counsel for defendant also contends that the factual basis for Mr. Wilkinson's plea was not adequately stated on the record.

"**Analysis**

"**Factual basis for plea**

"In hindsight, the factual basis of the plea issue could have been better handled by this court, however, the stipulation of counsel with reference to the police reports (and autopsy report) is legally adequate. At the outset of the plea, the court read the charge to Mr. Wilkinson from the Information stating each element of the charge to which he said he was prepared to plead. The prosecutor, Mr. Sequeira, stated for the record essentially that the defendant tied his grandfather to the back of a pickup truck and dragged his grandfather for about 6 miles causing traumatic injuries and killing him. He then dumped the body down an embankment. Ms. Thompson agreed that her client acknowledges that the facts as alleged are supported by the police reports. Defense

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[¶] . . . [¶] Wilkinson was asked, since he did not remember many details of his involvement in the incident, if he thought someone else might have done this to his grandfather. The defendant unwaveringly stated 'No. I take full responsibility.' "

counsel also specifically acknowledges that the facts were sufficient to find first degree murder and possibly the special circumstance as well. This court had a firm basis for finding that the defendant knowingly and voluntarily entered his plea. The facts as alleged supported the charge the defendant pled to. Under the rules set forth in *People* v. *Holmes* (2004) 32 Cal.4th 432, the factual basis colloquy with counsel in the presence of the defendant *is* sufficient. (See also *People* v. *Palmer* (2013) 58 Cal.4th 110.)

**"Allegations of incompetent representation**

"The argument with respect to alleged substandard representation is more complicated. Under Penal Code section 1018 the burden is on the defendant to show good cause for the withdrawal of his plea. Good cause is generally demonstrated if the defendant shows that he was operating under mistake, ignorance or any other factor overcoming his exercise of his or her free judgment including inadvertence, fraud, or duress. (*People v Breslin* (2012) 205 Cal.App.4th 1409.) The defendant's burden is to show good cause by clear and convincing evidence. (*People* v. *Cruz* (1974) 12 Cal.3d 562.) That burden is tempered somewhat by the fact that Penal Code [section] 1018 provides that the statute should be liberally construed 'to effect these objects and promote justice' and by the case law which suggests that in doubtful cases, the prejudgment motion should be granted. (See *People v Spears* (1984) 153 Cal.App.3d 79.)

"Even if a defendant meets the burden of demonstrating that he was acting under a mistake, he or she must still demonstrate prejudice, i.e. but for the mistake he would not have pled guilty. Where as here the defendant is claiming that his attorney's performance was deficient he must still demonstrate prejudice. (*Breslin, supra* at [p.] 1417). Even erroneous advice of counsel does not necessarily compel the court to grant a plea withdrawal. (*People* v. *Nocelotl* [2102] 211 Cal.App.4th 1091.) A defendant can't withdraw his plea simply because he has changed his mind. Guilty pleas resulting from a plea bargain should not be set aside lightly and the finality of proceedings should be encouraged. (*People* v. *Hunt* (1985) 174 Cal.App.3d 95.)

**"The Evidence**

"Mr. Wilkinson[']s] key contention is that he entered his plea to first degree murder because he didn't believe he and his attorney were prepared to go to trial. His declaration filed June 24, 2014 emphasizes that he was never told by either Mr. Purviance or Ms. Thompson that the special circumstance allegation carried a life sentence without the possibility of parole until the day before trial. That same day, according to Mr. Wilkinson's declaration, Ms. Thompson told him his case was hopeless and she made it sound like the first degree murder offer was 'new' and at least it provided him with a way to get out of prison some day. If the court believed that Mr. Wilkinson learned that the special circumstance carried life without the possibility of parole for the first time on the day before trial[,] this motion would be granted. These contentions, however, are not credible. Mr. Wilkinson specifically told Dr. Terrell in March of 2013 that he knew he would get life without the possibility of parole if he was to be convicted of the charges.[3] The first degree murder offer by the DA was made early in the case and reiterated in open court in response to Mr. Wilkinson's offer to plead to a second degree murder. From his testimony and his letters Mr. Wilkinson was keenly interested in trying to resolve his case without a life tail long before the morning of trial.

"When Mr. Wilkinson testified at the hearing on this motion he denied that he knew he could be facing life without the possibility of parole if he was convicted. He said that concept never occurred to him until the day of the plea bargain. He testified he thought he was facing 25 to life 'absolute max.' In 2013 he wrote that he was gun

[3] The doctor's report included the following: "When asked the charges against him, he told me that he is charged with murder with special allegations of torture. [¶] When asked which is more serious, a felony or a misdemeanor, he told me that a felony is more serious than a misdemeanor. [¶] When asked if he is charged with a felony or a misdemeanor, he told me that he is charged with a felony. [¶] When asked what would happen if he was found guilty of the current charges, *he told me he would get 'life without.'* When asked what 'without' meant, he told me that *it was life in prison without the possibility of 'parole.'* " (Italics added.)

shy of going to trial after reading the coroner's report. From his testimony it is clear that Mr. Wilkinson knew over a year before the plea that the coroner concluded his grandfather was alive when the defendant tied him to the back of the truck and drove off. The correspondence and his testimony demonstrate that Mr. Wilkinson knew that was the basis for the torture allegation and knew that the consequence of having it found true was life without the possibility of parole more than a year before the plea. He also knew well before the plea was entered that Ms. Thompson had consulted with an additional pathologist who could not refute the conclusion that the grandfather was still alive at the onset of the dragging.

"The defendant in his declaration, testimony and correspondence hits common themes of wanting and claiming he was denied his full discovery and wanting counsel to spend more time with him with the result, from defendant's perspective, that he did not feel he was prepared for trial and didn't know if his lawyer was. Defendant did know that Ms. Thompson had retained Dr. Terrell to explore a mental defense. He also knew that Ms. Thompson intended to call Dr. Good and to introduce evidence of defendant's intoxication on the night of the offense through the prosecution's witnesses. The defendant testified that he knew this wasn't a 'who done it?' and there was no issue of self defense. The defendant knew he had killed his grandfather and that he had made a number of statements about the killing, many of which conflicted and not all of which were true. It is apparent to the court that he knew his counsel wanted to call him as a witness. She had told him repeatedly that he was a good client to put on the stand because he didn't have priors for impeachment purposes and he was young and likable. No doubt defendant was nervous about testifying and the court accepts as true that he did not feel prepared to testify at the time he entered the plea. Counsel's explanation that she wanted to wait until the prosecution case was concluded before going over his proposed testimony in detail with him is within the range of tactics that a competent lawyer might apply. One advantage the defense has is that the defendant can listen to the entirety of the prosecution case before deciding whether

and how to testify. A better practice would have been to fully communicate that strategy and the reasons for it to the defendant.

"In the weeks before trial the court heard and decided not to grant a defense motion to change venue. The motion was denied with leave to renew during jury selection but the defendant felt that was a blow to his case. The defendant had contended as early as 2012 that he could not get a fair trial in Mendocino County. The court also tentatively granted a prosecution motion in limine to allow a jury view of the route the defendant took while dragging his grandfather from the point where the defendant tied his grandfather to the truck to the spot where he dumped the body. Both Mr. Wilkinson and his attorney felt that was a huge blow to his defense in that it would undermine his intoxication and mental state contentions. The route was lengthy with many twists and turns. Defendant's ability to navigate that stretch of roadway to the place he intended to dump the body was a factor that could influence the jury.

"When Ms. Thompson talked to the defendant about a possible resolution as first degree murder without the special circumstance, she didn't tell him he had to take it. The court does not believe that she said the case was hopeless. Both Ms. Thompson and the defendant claim that they discussed the risks of going to trial and the significance of obtaining a possibility of parole. Ms. Thompson told him to think about it and let her [know] the next day whether he wanted to plead to first degree murder. There is no evidence of coercion, fraud or deception on the part of counsel. The defendant admitted that there was no arm twisting. The defendant had clearly been interested in negotiating the best resolution he could get for more than a year before the plea bargain was struck. The DA made it clear from the outset that he would never accept anything less [than] a first degree murder plea. Ms. Thompson communicated that to the defendant. The defense offer to plead to second degree murder was rejected by the prosecution in open court in the defendant's presence. There is no evidence to suggest that somehow Ms. Thompson could have negotiated a better disposition. From the prosecution contention, the special circumstance could stick. Defendant tied a living human being to the back of his pick-up and dragged him six miles resulting in a

horrible death. From the defense perspective the defense could argue that Mr. Wilkinson had already killed his grandfather before he dragged the body behind the truck. If believed, that would defeat the special circumstance but not the murder charge. Defendant was adequately represented in the plea negotiations. The public defender was committed to this young man and clearly wanted to avoid an LWOP commitment for one so young. The DA would not budge. The defendant had a clear choice. He could plead to first degree murder and obtain the possibility of parole or he could go to trial and risk life without the possibility of parole.

"Mr. Wilkinson was clearly advised of the consequences of his plea. It was a bargain that he entered into. In exchange for his plea the special circumstance was dismissed. The court read the charge to him as it appeared on the information. The defendant agreed that he had sufficient time to discuss the matter with his attorney. Mr. Wilkinson answered the questions directly and gave no indication that he was under any kind of duress.

"At the time the plea was entered a jury panel was gathering in a jury assembly room. Numerous witnesses had been subpoenaed and the court was prepared to go forward with a lengthy trial. Ms. Thompson represented that she was prepared to try the case. She had competently tried a first degree murder case in the same courtroom just months before. She intended to demonstrate intoxication through the prosecution witnesses and mental state evidence through Dr. Terrell and Dr. Good. She decided to let detailed preparation of the defendant for his own testimony to ride until the prosecution had presented its case.

"Ms. Thomson [*sic*] has over 28 years experience in trying criminal cases. She has handled a substantial number of homicides and handled a first degree murder trial in this court while the Wilkinson matter was pending. She ultimately assigned the case to herself because of her experience level and the emotional burden involved. She recognized early on a mental state defense was the best shot for the defense. She enlisted a trusted expert, Dr. Terrell, to help her explore that. The subsequent court appointed expert reports pursuant to the NGI plea, although not supportive of legal insanity,

produced more material that she could use in presenting the best defense supportable by the evidence. In view of the coroner's conclusion that the grandfather was alive when dragged[,] Ms. Thompson consulted with another skilled pathologist to see if that opinion could be negated. Dr. Haddix could not, from the evidence, opine that the grandfather was dead before he was dragged. As Ms. Cole Wilson points out, she might have been helpful in attacking the basis for the coroner's opinion. Ms. Thompson seems to have taken the approach that calling a forensic examiner who couldn't negate the prosecution expert's opinion would not be helpful. Reasonable lawyers could disagree.

"As the DA pointed out in his opposition the defendant does not have the right to have the case conducted as he sees fit. Competent counsel can make tactical decisions that are subject to criticism [by] other competent counsel. Ms. Cole-Wilson would have handled this case very differently. She would have spent more time with the defendant and would likely have preliminarily prepared him to testify much earlier than Ms. Thompson did. As far as the court can determine from the evidence, the defendant had a number of contact and non-contact visits with Ms. Thompson at the jail, about 5 visits from the defense investigator and at least a dozen in court contacts with counsel. He was provided several times with the discovery that counsel thought he should have and at one point, a couple of months before the plea, he sent a packet of discovery to another lawyer to seek review and advice. No party actually advised the court as to exactly what Mr. Wilkinson had been given or introduced copies of what he had been given. It is clear to the court that the defendant knew that the nub of the case was whether his grandfather was dead or alive before he was dragged. The defendant voiced criticism of the coroner's conclusion. The court is not convinced that the discovery issue reflects deficient performance by Counsel.

"The defendant obviously wanted more contact with and reassurance from counsel than he got. Ms. Thompson felt that the defendant had sufficient contact with counsel for effective representation. Competent counsel have a wide range of practice as to how much client contact is necessary and appropriate in the preparation of a case. Ms.

Cole-Wilson would have interviewed or taken statements from more witnesses and likely would have lined up character witnesses as well. She would have made sure that Dr. Haddix was under subpoena for impeachment purposes. She would have spent much more time with Mr. Wilkinson. All of this may have made the defendant feel better represented but it is not clear that the outcome would change in any way. Mr. Wilkinson would still be faced with the choice of risking an LWOP conviction or taking the only deal available. The court is supposed to give deference to counsel's tactical considerations. There was certainly a risk that the special circumstance would be found true at trial. No doubt the defendant faced a very hard choice and he knew he had to make it that morning. That choice had been pending for quite some time. The court has no doubt that he understood that choice and the consequences of that choice and chose the certainty of having a possibility of parole in the future over risking the possibility that the special circumstance would be found true and he would never be paroled.

"**Conclusion**

"Defendant has not met his burden or proof for the court to [allow] the plea withdrawn. The defendant has not demonstrated that the conduct of his lawyer fell below an objectively reasonable standard or that, but for the below standard conduct of counsel, he would not have entered the plea. Clearly he was angry and upset with counsel after entering the plea but he entered the plea knowingly and intelligently with an understanding of the consequences after weighing his alternatives. The bargained-for avoidance of the risk of life without the possibility of parole and not some perceived failing of counsel motivated the plea."

## REVIEW

### Judge Behnke Did Not Abuse His Discretion in Concluding There Was a Factual Basis for Defendant's Guilty Plea

Defendant's claim that his plea lacked a factual basis is his secondary argument, but we address it first because it occurred first, and to avoid repetition, because some of the details connected with it are pertinent to defendant's primary argument that he should have been permitted to withdraw his guilty plea. We also consider the merits even

though we may not be obliged to do so. (See *People v. Voit* (2011) 200 Cal.App.4th 1353, 1365–1368 and decisions cited [exploring split of authority on whether factual basis sufficiency is reviewable following guilty plea].)

Prior to accepting a plea of guilty, the trial court "shall . . . cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." (§ 1192.5.) "[I]in order for a court to accept a [guilty] plea, it must garner information regarding the factual basis for the plea from either defendant or defense counsel to comply with section 1192.5. If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge [citation], or question the defendant regarding the factual basis described in the complaint or written plea agreement. [Citations.] If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. [Citation.] Under either approach, a bare statement by the judge that a factual basis exists, without the above inquiry, is inadequate." (*People v. Holmes* (2004) 32 Cal.4th 432, 436.)

Defendant contends his guilty plea was taken in violation of these safeguards. Success will not be easy. "[A] trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea. The trial court's acceptance of the guilty plea, after pursuing an inquiry to satisfy itself that there is a factual basis for the plea, will be reversed only for abuse of discretion." (*People v. Holmes*, *supra*, 32 Cal.4th 432, 443.) That will not happen here.

There is nothing like "a bare statement" here. After going through the *Boykin-Tahl* waivers, Judge Behnke stated: "I would like counsel to state a factual basis." The prosecutor responded: "On the 17th of March 2012, sometime between 8:30 and 10:30 in the evening, the defendant took the victim, Richard Wilkinson, who was his grandfather, he was 84 years old, tied him to the back of a Chevrolet pickup and drug [*sic*] him from

East Hill Road approximately six miles to Mariposa Creek Road, which is up toward the top of Pine Mountain, drug him for six miles, which caused traumatic injury to the victim, killed the victim, and then he dumped the body down an embankment on Mariposa Creek Road."

Judge Behnke then addressed defendant's counsel: "Okay. Miss Thompson, will your client acknowledge those facts?" Counsel replied: "My client acknowledges that the facts as alleged are supported by the police reports. . . . [B]ased upon my review of the autopsy report and the fact that I did retain an expert to review that, my expert would be unable to indicate that any of the injuries occurred prior to the dragging such that would support my client's belief that his grandfather was deceased prior to dragging him behind the truck. [¶] We're concerned that there are facts sufficient to find a first-degree murder and possibly facts enough to find the torture special circumstance, and based upon my client's age, we cannot take that risk. So he is taking responsibility for the death of his grandfather."

The prosecutor then added: "The only thing I'd like to add, which I neglected, I think it was clear from my statement, but that the evidence that we have shows that the victim was alive while being drug [*sic*]."

Although defense counsel did not stipulate to a particular document, the Supreme Court did not designate this procedure as mandatory. Judge Behnke did not "develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge," but he plainly directed the prosecutor to do so. The prosecutor's recital was rich in detail, but did not reference a particular document. However, defense counsel's concurrence mentioned at least two—"the police reports" and "the autopsy report." Moreover, the prosecutor's recital did include "the name[] of . . . the victim, the date and location of the charged offense, and a brief description of the factual basis for the charged offense," which our Supreme Court held was "sufficient under the section 1192.5 standard." (*People v. Holmes, supra*, 32 Cal.4th 432, 443; see *id*. at p. 441 ["section 1192.5 does not require more than establishing of a prima facie factual basis for the charges"].) Judge Behnke had already

read the charge from the amended information to defendant at the hearing. And defendant had already told Judge Behnke that he had "had enough time to discuss this case" with his attorney. (See *People v. Palmer, supra,* 58 Cal.4th 110, 114 ["where defendant acknowledged in the plea colloquy that he had discussed the elements of the crime and any defenses with his counsel and was satisfied with her advice, the trial court did not abuse its discretion in finding a factual basis"].)

In light of all the circumstances attending defendant's change of plea, we conclude Judge Behnke did not abuse his discretion when he was satisfied there was a factual basis for defendant's guilty plea.

One related point is significant to the ensuing analysis. The record on appeal does not include a preliminary examination transcript because defendant waived his right to that proceeding. There will be mention of various reports (police, coroner's), but they likewise are not in the record. And they were not attached to defendant's motion or introduced at the evidentiary hearing on defendant's motion. In short, the content of those reports must remain a matter of speculation.

**Governing Principles for Withdrawing Plea Because Of Ineffective Assistance of Counsel at the Time of Entering the Plea**

" 'A defendant who seeks to withdraw his guilty plea may do so before judgment has been entered upon a showing of good cause. [Citations.] "Section 1018 provides that . . . 'On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.' Good cause must be shown for such a withdrawal, based on clear and convincing evidence. [Citation.]" [Citations.] "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.]" [Citation.] "The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty." [Citation.]'

" ' "When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.] On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.]" [Citation.] "Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." [Citation.]' " (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) " 'Where a defendant has been denied the effective assistance of counsel in entering a plea of guilty, he is entitled to reversal and an opportunity to withdraw his plea if he so desires.' " (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1356.)

" 'The law governing defendant's claim is settled. "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.' " [Citations.] It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] We have summarized defendant's burden as follows: " 'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: " 'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had

no rational tactical purpose for [his or her] act or omission.' " [Citation.]' [Citation.] If the record on appeal ' " 'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected," ' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 875–876.)

These principles apply to a defendant who pleads guilty, but with one distinct twist: "It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty," "a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.)

A defendant is required to present clear and convincing evidence to the trial court, but that standard is solely for the trial court. On appeal, the standard is abuse of discretion, with any factual findings made by the trial court upheld if they are supported by substantial evidence. (E.g., *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Breslin, supra,* 205 Cal.App.4th 1409, 1415–1416.) Thus, "the trial court on a contested motion to withdraw a plea of guilty . . . under section 1018, is the trier of fact and hence the judge of the credibility of the witnesses or affiants." (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.) " 'A trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence contradicting it, and this rule applies to an affidavit.' " (*People v. Caruso* (1959) 174 Cal.App.2d 624, 636.) Finally, it is a bedrock principle of appellate review that credibility determinations are made exclusively by the trier of fact, here, Judge Behnke, and are conclusive on appeal. (E.g., *People v. Lindberg* (2008) 45 Cal.4th 1, 27 ["A reviewing court neither reweighs evidence nor reevaluates a witness's credibility."]; *People v. Ramiriz* (1934) 1 Cal.2d 559, 563 [" 'The trial judge's determination of the question of . . . credibility is conclusive upon us.' "].) It is important to realize just how constricted our review must

be as we turn to the particulars of defendant's attack on Thompson, and on Judge Behnke's decision.

**Application**

Defendant's charges against his former counsel are utterly at odds with Judge Behnke's estimation. Defendant asserts that Thompson: (1) "failed to adequately consult" with him; (2) "failed to prepare Mr. Wilkinson to testify"; (3) "failed to advise Mr. Wilkinson of a crucial defense"; (4) "failed to adequately investigate the case"; and (5) "failed to adequately prepare herself for trial." His most disturbing assertion is that "Thompson failed to convey or discuss the prosecutor's offer with Mr. Wilkinson for over a year and instead waited to do so until the night before jury selection was set to begin."

Many salient details cited in Judge Behnke's ruling, and shown by the record, are not contested by defendant. He does not dispute that his dissatisfaction with Mr. Purviance led him to make a *Marsden* motion; that in denying it Judge Behnke told defendant the motion could be renewed; and that defendant did not do so when represented by Thompson. He does not dispute that he and Thompson quickly decided on the defense strategy: there would be no claim of misidentification, alibi, or self-defense, "so," as defendant testified, "it was a combination of an intoxication defense and a mental defense." Defendant accepts that Thompson did not tell him he had to plead guilty, or that he was subjected to coercion in any form. And he no longer contends that he entered his guilty plea without knowing its penal consequences.

**(1)**

But he does renew his claim that Thompson "failed to convey or discuss the prosecutor's offer with Mr. Wilkinson for over a year and instead waited to do so until the night before jury selection as set to begin." Judge Behnke specifically found that defendant's testimony on this point not believable ("If the court believed that Mr. Wilkinson learned that the special circumstance carried life without the possibility of parole for the first time on the day before trial this motion would be granted. These contentions, however, are not credible.")

That assessment of credibility is decisive, for it neutralizes any testimony by defendant, and that assessment has to be accepted here. (*People v. Ramiriz*, *supra*, 1 Cal.2d 559, 563.) That assessment clearly incorporates Judge Behnke's refusal to believe that the experienced Thompson would violate so elemental a duty as her obligation to communicate a settlement offer to defendant. (See Rules Prof. Conduct, rule 3-510(A)(1) ["A member shall promptly communicate to the member's client . . . [a]ll terms and conditions of any offer made to the client in a criminal matter"].) And without any credible testimony from him on this point, and no documentary proof, defendant obviously failed to present clear and convincing evidence demonstrating good cause to withdraw his plea. (Cf. *In re Alvernaz*, *supra*, 2 Cal.4th 924, 938 ["a defendant's self-serving statement . . . that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence"].)

There is a separate and independent ground for upholding Judge Behnke on this point. That ground is the standard substantial evidence analysis.

Judge Behnke's finding that there was no other substance to the contention is supported by the transcript for March 27, 2014, which shows Thompson discussing, in defendant's presence, the substance of the ultimate deal.[4] Thompson testified that she was continually negotiating with the prosecution because "Kenny really wanted me to push it." At his urging, and with his approval, extensive talks were had about

[4] Thompson advised Judge Behnke: "My client's *still* prepared to enter a plea to a second-degree murder. . . . I was hoping Mr. Sequeira would have a chance to speak to the family to see if they have any position as to that, but we'd still like to resolve it. . . . My client's willing to take responsibility with a life tail. I was really hopeful we could resolve this. *That's still on the table*. I'm hoping there's still discussions. [¶] . . . [¶] [T]here's also an issue with the torture allegation. But we'll deal with it." (Italics added.) Later at the hearing Ms. Thompson stated: "[W]e've had discussions; and based on my client's age and I think evidence supports the question as to mental state, that the D.A. would find acceptable . . . a conclusion of . . . *25 to life*." (Italics added.) Mr. Sequeira responded: "I took all those things into consideration, which is why I offered the defendant a first-degree murder as opposed to the special circumstance."

manslaughter, and then second degree murder, but "[n]othing with a life tail." Defendant was totally aware that "the family was never going to accept . . . anything other than a first [degree]." From the time of one of the setting conferences, Thompson knew that the prosecution was "willing to dismiss the special circumstance" in exchange for a plea to first degree murder. She communicated this offer to defendant "not the day before, but well before the trial."

Thompson further testified before Judge Behnke: When she spoke to defendant in the morning on the day before trial: "[T]here hadn't been any change in the posture of any of the witnesses; for example, to claim after the fact that Kenny had voiced ill will towards his grandpa or had ever said anything negative about grandpa, so I didn't explore those options. I felt that the family . . . their position . . . of you . . . hadn't changed . . . . I felt that Kenny himself and your witnesses and toxicology would put forward the defense." After Judge Behnke denied the defense motion for change of venue, and granted the prosecution's motion for a jury view of the route driven by defendant, Thompson "felt that I needed to talk to him [defendant] about . . . how those rulings were going to have an impact on the trial." Defendant understood the significance of the jury view ruling.

According to Thompson: "I said I'm concerned . . . . If the jury believes that for one second your grandfather was alive during the dragging, that was a problem. . . . [¶] I told Kenny that I was concerned the jury view . . . would just shut them down to what our position was. And I asked him, 'Would you allow me to explore with Mr. Sequeira if he would still accept a first and strike the special?' Thompson laid out the possibilities: "I didn't think you could win on the torture, and I did tell Kenny that. But I didn't want to take a chance that the jury wasn't going to listen to us and he could potentially get a special circumstance." "But I told him not to make the decision then. I just told him what my concerns were. I said I'll talk to you in the morning. I wanted him to sleep on it." On the day of trial, defendant told her " 'I think we should take the offer.' " He was calm and coherent. He authorized Thompson to speak to Sequeira "to see if the deal's

still on the table." She returned and told him: " 'Mr. Sequeira's still willing to take the torture off the table. Are you ready to go?' "

This evidence shows that Thompson kept defendant advised on current negotiations with the prosecutor. The evidence also supports an inference that those negotiations were conducted only after Thompson secured defendant's express authorization. Even defendant conceded "[s]he didn't tell me I had to [plead guilty]." His decision to do so, which he told Judge Behnke was his own, came only after he had had time to digest the jury view ruling, whose impact he recognized "would be pretty huge" and possibly even "devastating." Thus, there is ample—if not abundant—substantial evidence that defendant was not sandbagged as he claims.

**(2)**

Defendant does renew his claim that Thompson "failed to advise Mr. Wilkinson of a crucial defense, namely, that the expertise of the coroner who had conducted the autopsy report had been discredited and that both the police investigation and coroner's autopsy had been poorly conducted." As a follow-up to this argument, defendant argues that "Thompson's decision not to present Dr. Haddix's opinion that the investigation and autopsy were poorly conducted was objectively unreasonable because it lacked a rational basis."

According to defendant: "Thompson here failed to inform Mr. Wilkinson of crucial evidence that could have formed the basis of a potentially meritorious defense to the first degree murder charge and to the torture enhancement before advising him to plead guilty to the first degree murder charge. . . . Thompson failed to inform Mr. Wilkinson that Dr. Haddix, the forensic pathologist who Thompson had retained to evaluate the report of the coroner, Dr. Trent, had a 'strong opinion' that both the police investigation and the autopsy by Dr. Trent had been poorly conducted and, as a result, she [Thompson] could not have reliably determined whether [defendant's grandfather] had died prior to the dragging or as a result of the dragging. Dr. Haddix believed that the police investigation had been poorly conducted, in part, because tissue samples had not been recovered and had, instead, been left on the road. She also had 'never liked Dr.

Trent's M.O.' because he was 'really terrible' at taking photographs during an autopsy and did not do a good job recording the procedures that he had used during it, and that was the case with respect to the autopsy that he had conducted. [¶] Dr. Haddix's opinion that the investigation and autopsy had been poorly conducted would have substantially undermined Dr. Trent's opinion that [defendant's grandfather] had still been alive when Mr. Wilkinson had tied him to the back of the truck. Dr. Trent's opinion in this regard, was the only evidence that could have supported a reasonable inference that Mr. Wilkinson had premeditated or deliberated the murder, as required for first degree murder, and had specifically intended to torture [the victim]."

Dr. Haddix was a forensic pathologist, and former medical examiner, with considerable experience. Thompson testified that she had a high estimation of Dr. Haddix and retained her to "review this case," specifically the autopsy performed by Dr. Trent. Dr. Haddix was asked to look at "the way the autopsy was conducted" and, more specifically, Dr. Trent's conclusion that the victim was still alive when defendant started dragging him behind his truck. Dr. Haddix's answer[5] was that she had insufficient material to refute Dr. Trent's conclusion. So, because "she couldn't help me," Thompson decided "I couldn't call her."

Thompson explained her decision: Dr. Trent's autopsy was observed by Dr. Chapman. According to Thompson: "[H]e was there, he watched the autopsy and was going to agree with [Dr. Trent's] opinion." Thompson knew that Dr. Trent "in previous proceedings in this courthouse . . . had been discredited to some degree." She also knew, because she had discussed it with prosecutor Sequeira, that Dr. Trent was not going to be used, and that Dr. Chapman would testify as to the autopsy results. And as for Dr. Chapman, Thompson believed he was "[m]ore than qualified to render an opinion." Defendant testified that any possible deficiencies with Dr. Trent's autopsy were never mentioned by Thompson.

[5] If Dr. Haddix's "answer" was reduced to writing, it was not produced at the hearing.

With the exception of the defendant who insists on testifying, the decision "whether a particular witness should be called" is confided to "an attorney's control over matters of ordinary trial strategy." (*People v. Frierson* (1985) 39 Cal.3d 803, 813.) Thompson's decision not to call Haddix comes within this principle.

Initially, it should be emphasized that the evidence does not support defendant's unstated assumption that Dr. Trent's autopsy report was worthless. Thompson testified that "Dr. Trent already had his issues," but she provided no specifics. There was no evidence that Dr. Trent had been relieved of his duties, or was otherwise forensically incompetent. Indeed, were the latter true, Dr. Chapman could not have testified as to the results of the autopsy performed by Dr. Trent. Dr. Haddix clearly had disagreements with the manner in which Dr. Trent conducted the autopsy, and these may have involved more than procedural quibbles, but she stopped well short of condemning the autopsy as professionally barren. Whatever its defects, Dr. Haddix found insufficient grounds for publically disputing Dr. Trent's ultimate conclusion that the victim was alive when defendant turned the ignition key of his truck. Defendant is therefore mistaken in asserting that the less than perfect autopsy constituted a "crucial defense."

It would be Dr. Chapman who would be called in the prosecution's case-in-chief, not Dr. Trent. Dr. Trent's credibility might have been compromised—which might explain the prosecution's decision not to use him as a witness—but Dr. Chapman's had not. Putting Dr. Haddix on the stand might impeach the mechanics of Dr. Trent's autopsy, but there is no indication that she would discredit Dr. Chapman's opinion. In Thompson's own words, Dr. Haddix "told me even with the poor investigation, she didn't have enough information to say the grandfather was deceased or alive prior to the dragging."

Moreover, Thompson testified that she thought defects in the investigation would not prove consequential: "I don't know if the jury would be so perturbed about the fact that law enforcement didn't pick up the grandfather's internal organs from the ground would be enough to help us with a defense." In other words, if the jury accepted the autopsy conclusion that the victim was alive, the details of how the autopsy might have

been better conducted would become insignificant.[6] As Thompson vividly put it: If the jury believed "for one second" the victim "was alive during the dragging," "that would just shut them down to . . . our position." The jury could get that belief from photographs of "how the body was found at the bottom of the cliff," photographs from the autopsy, and most dangerously, retracing the route of defendant's truck. Thompson knew that defendant appreciated this possibility, which was what persuaded him to let Thompson make the final approach to the prosecution for a deal.

As Judge Behnke correctly noted at the hearing, this is a tactical decision about which reasonably competent trial counsel would reach differing conclusions. So, while Judge Behnke might have been correct in chiding Thompson for not acquainting defendant with the reasoning behind her decision not to use Dr. Haddix, that decision does not satisfy either of the two tests for constitutionally incompetent counsel: it was within the range of reasonable tactics, and there is no reasonable probability that defendant would have insisted on going to trial. (*In re Alvernaz*, *supra*, 2 Cal.4th 924, 934.)

**(3)**

Defendant does renew his claims that Thompson: (1) "failed to adequately consult" with him; (2) "failed to prepare [him] to testify"; (3) "failed to adequately investigate the case"; and (4) "failed to adequately prepare herself for trial." Insofar as the consultation involves an alleged failure keep him abreast of plea negotiations with the prosecution, it is refuted by our preceding discussion. We are mindful that "defendant's self-serving statement[s] . . . [are] insufficient . . . and must be corroborated independently by objective evidence." (*In re Alvernaz*, *supra*, 2 Cal.4th 924, 938.)

Thompson testified that defendant "got his . . . discovery. I don't know if Kenny had the same definition of discovery some of the other inmates have. Some people don't

[6] Judge Behnke noted how it could actually harm the defense: "[I]f the defense calls that witness to say, well, I don't have sufficient information to . . . directly contradict the testimony of the prosecution's expert that the grandfather was alive at the time of the dragging, that could impact badly in the eyes of the jury."

know what discovery is. And I just say, 'You've got to understand what discovery is. It's the police reports, it's the physical documents we have, and it's typically disks.' [¶] And so I also informed . . . Kenny, and I inform every client, when I give them discovery, I give them the narratives. I don't give them the computer generated. And . . . I tell them it's got to be redacted. I also didn't make transcripts of the disks. . . . When I first started meeting with Kenny, those were going to be done for trial. . . . [¶] Farris [Purviance] had downloaded all of the pictures. I didn't give those to Kenny until just before trial. I didn't want those pictures in his cell."

"But I tell him discovery is the police reports. He got the police reports. Before he got the police reports, he . . . asked for the toxicology report and the autopsy report. I think those were the first things he asked for. But he got the discovery."[7]

"[T]here were a couple of times that Kenny told me he didn't have the discovery. So, I know one point in time, I know Farris [Purviance] . . . gave him a packet. [Defendant [s]aid he didn't receive it. So I gave him a packet. Then he claimed he didn't have all of it. So I asked for another packet. Then Kenny asked, I think, for a third packet. I made Manny [Lopez, a public defender investigator] go out and talk to him[8] and say, 'Where's the discovery?' And I was informed he gave it to another attorney. So I said, 'You need to get it back from that attorney.' "

Thompson further testified that defendant "wanted me to talk to some individuals" as possible character witnesses. She and defendant "talked about character witnesses." The one person defendant specifically named was in state prison, and "based upon what Kenny was telling me, I didn't see that that had relevance." This was not unusual in her

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[7] Defendant testified that eventually "I got all of them . . . . First I got a coroner's report, then I got police reports, then I got the psychiatrist's reports, and then I got the photos last." Defendant did not dispute Thompson's testimony that she "included all three doctors' reports in a packet I gave to Kenny."

[8] According to Ms. Thompson: "[A] lot of times . . . . [I]f I receive a letter or . . . some communication that the client's concerned about things and I can't get there, I send one of the investigators."

experience. Thompson also believed because "[i]t [was] an LWOP case. . . . I did not feel that this is a case where character witnesses would help the defense."

It was not Thompson's practice to prepare her clients to testify in advance of trial. "[T]here's a lot of reasons why I don't do this, but let me say specifically why I didn't do that in this case" was because of "[t]he concern that I had is that Kenny couldn't remember a lot about what happened." "I felt he would do great in front of a jury, and I believed a jury needed to hear from him. [¶] But with prep, . . . I do it fairly generally" "because I don't want somebody to think that I've trained you." "[E]ven though I knew from day one I was going to put him on no matter how [the prosecution's] case went, I wasn't going to prep him until we were going to start the defense."

Thompson further testified that on the day of trial she was prepared to go to trial, pick a jury, argue her case to the jury, and cross-examine the prosecution's witnesses. Depending on how voir dire of potential jurors developed, she was ready to renew the motion for change of venue. She had "witnesses prepared to testify for the defense." Thompson also believed defendant was ready for trial. She told him "I was ready to go forward and he didn't have to enter the plea."

As already noted, Thompson's communication with defendant might have been better. Still, it is not irrelevant to recall that she was not just *a* public defender, she was *the* public defender for the county, and consequently had many demands for her attention. With defendant's agreement, she had early-on identified his mental state as the most promising avenue to avoiding a first degree conviction. Towards that end, Thompson had secured the reports of Drs. Terrell, Good, and Apostle. Terrell and Good had been subpoenaed, but Thompson did not think it was necessary to secure Apostle 's attendance.

Defendant's intoxication would also be addressed, through his testimony. Or not. Thompson had another reason not to prepare defendant to testify: "I wouldn't do it until I was absolutely certain the client was going to testify. . . . I mean, he is the final arbiter of whether that's going to happen." After speaking with defendant, Thompson had decided against using character testimony ("It [was] an LWOP case. . . . I did not feel that this is

a case where character witnesses would help the defense"), again, something within her decisional authority. (*People v. Frierson, supra,* 39 Cal.3d 803, 813.) In addition to not providing the names of witnesses who would furnish potentially exculpatory testimony, defendant failed to present independent proof of the actual substance of what Thompson would have discovered had she made the investigations he claims were necessary. (See, e.g., *In re Cox* (2003) 30 Cal.4th 974, 1016 [" 'petitioner must . . . establish the nature and relevance of the evidence that counsel failed to . . . discover' "]; *People v. Medina* (1995) 11 Cal.4th 694, 773 ["On direct appeal, a claim of ineffective counsel cannot be established by mere speculation regarding the 'likely' testimony of potentially available witnesses. [Citation.] We cannot assume from a silent record that particular witnesses were ready, willing and able to give mitigating testimony, nor can we speculate concerning the probable content or substance of such testimony"]; *In re Alvernaz, supra,* 2 Cal.4th 924, 938.)

Defendant now faults Thompson for not providing "transcripts of either of his recorded confessions" and for not playing those recordings, as well as "the recorded statements of his family members." But Thompson explained her reasoning for this, which qualifies as a reasonable tactical decision.[9] And the hearing transcript demonstrates that defendant was in no doubt of his family's hostile attitude, but they could not testify to any prior expressions of animus by defendant towards the victim. Finally, we think it significant that Judge Behnke did not conclude that Thompson deprived defendant of any discovery materials to which he was entitled.

**(4)**

There is a final matter raised in defendant's opening brief, another instance of Thompson failing to investigate. This cannot be characterized as the renewal of an argument made to, and rejected by, Judge Behnke. The specific issue was not expressly mentioned in defendant's moving papers, or in the declaration he made in support of his

[9] Thompson also testified she told defendant that the content of the family statements was "very, very limited. And the recorded statements really didn't say anything much more than what was in the [police] report."

motion, although it did figure in his closing argument. In light of this ambiguous posture, and in the interest of completeness, we elect not to treat the issue as forfeited.

The claim, as framed in the caption of his brief, is that "Thompson failed to investigate the alleged disappearance of the victim's dog." The details are that the victim had a pet dog that was always with him, but which was not present " 'when they found grandpa.' " From this defendant argues "the dog's disappearance could have raised a reasonable inference that Mr. Wilkinson had harbored malice when he killed Richard."

Defendant testified that Thompson raised this issue the day before he changed his plea to guilty: "Miss Thompson's key words were, God forbid that Paul Sequeira asks you what happened to your grandfather's dog. She said that wouldn't look really good in front of a jury is what she told me." Defendant testified that this "frightened" him because "[i]t was a big issue," even bigger than the jury view.

This was denied by Thompson: "The only mention of the dog I think was weeks before. Definitely didn't talk about the dog on the Sunday. It was weeks before. I don't even remember how it came up. I just remember that it was just something I pulled out, that one of the family members had said that grandpa had this little dog that was never separated from him, that was always by his side, and that they didn't have the little dog when they found grandpa. And that was it." She never said "God forbid Paul Sequeira find out about the dog."

Given that Judge Behnke pretty much disbelieved all of defendant's claimed influences and mental processes leading to his change of plea, it appears most unlikely he either did or would have on this point. If so, the uncorroborated basis for defendant's contention disappears. (*In re Cox*, *supra*, 30 Cal.4th 974, 1016; *In re Alvernaz*, *supra*, 2 Cal.4th 924, 938.)

The inference defendant fears would be dependent upon the jury accepting that defendant had killed the dog and disposed of the dog's body either before commencing the death ride or after. Defendant maintains that had Thompson investigated she would have learned that the dog was found alive and well "the same day as the killing." Concede this as true, how does not killing the animal disprove homicide?

Defendant insists, in his reply brief, that the matter of the dog must have been important because Thompson wouldn't have mentioned it otherwise. This reasoning is circular, founded on the same questionable predicate of Judge Behnke crediting defendant's testimony.

This court has held that "the question is not what the ' "best lawyers would have done," ' nor ' "even what most good lawyers would have done," ' but simply whether ' "some reasonable lawyer" ' could have acted, in the circumstances, as defense counsel acted in the case at bar." (*People v. Jones* (2010) 186 Cal.App.4th 216, 235.) We conclude Judge Behnke did not abuse his discretion when, having determined that attorney Thompson satisfied this standard, he concluded there was no reasonable probability any act or omission by Thompson would have stopped his changing his plea to guilty (*In re Alvernaz*, *supra*, 2 Cal.4th 924, 934), and therefore denied defendant's motion to withdraw that plea.

**DISPOSITION**

The matter is remanded to the trial court solely for it to determine whether defendant had sufficient opportunity to present information relevant to his eventual offender parole hearing. (*People v. Franklin* (2016) 63 Cal.4th 261, 283–284.) "If the trial court determines that [defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [Defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Id*. at p. 284.)

The judgment of conviction is affirmed in all other respects.

_____
Richman, Acting P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

A143605; *P. v. Wilkinson*